Filed 5/1/12 In re Jessica G. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re JESSICA G., a Person Coming Under the Juvenile Court Law.	
FRESNO COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. LORENZO G., Defendant and Appellant.	F062820 (Super. Ct. No. 02CEJ300222-4) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Jane A. Cardoza, Judge.

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and Appellant.

Kevin B. Briggs, County Counsel, and William G. Smith, Deputy County Counsel, for Plaintiff and Respondent.

-ooOoo-

Lorenzo G. (appellant) appeals from the order summarily denying his Welfare and Institutions Code section 388 petition.[1] He also contends that the juvenile court prejudicially erred in failing to address his Judicial Council form JV-505: Statement Regarding Parentage (JV-505 form) and in granting the Fresno County Department of Social Services (the department) discretion in allowing him to visit the minor Jessica. Finding no merit in appellant's contentions, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On September 30, 2010, the department filed a section 300, subdivision (b) petition alleging that six-year-old Maria, two-year-old Jessica, 19-month-old C. and five-month-old Co. were at risk of harm due to domestic violence in the home and the mother's substance abuse. Mr. M. was listed as Maria's alleged father; Mr. A. as Jessica's alleged father; and appellant as Jessica's alleged father and the biological and presumed father of the youngest two children, C. and Co.

At the time of the October 2010 jurisdiction report, Mr. A.'s whereabouts were unknown. Appellant was listed as the presumed father of C. and Co., and the alleged father of Jessica, although appellant was "not holding himself out to be Jessica's father."

At the January 12, 2011, jurisdiction hearing, the juvenile court found the petition true, as amended in mediation. The department reported that appellant's mother had been denied possible placement, and it recommended Mr. A.'s parents as placement for the three younger children, who were in foster care. Maria was placed with a paternal aunt.

The February 2011 disposition report stated that appellant had told the social worker that C. and Co. were "very important" to him and that he was willing "to do whatever" to get them back. No mention was made of appellant's interest in Jessica, although, as in the earlier report, appellant was listed as Jessica's alleged father and that appellant was "not holding himself out to be Jessica's father." A DNA test done in

[1] All statutory references are to the Welfare and Institutions Code unless otherwise stated.

November of 2010 confirmed that Mr. A. was Jessica's biological father, but he did not want Jessica placed with him.

At the February 23, 2011, disposition hearing, the juvenile court granted the department discretion to begin unsupervised visits between appellant and "his children." Unsupervised visits for Mr. A.'s parents with Jessica were approved, as requested by the department. The department recommended reunification services for Mr. M. and appellant, but not for Mr. A. and the mother. The matter was set for a contested disposition hearing.

At the March 8, 2011, settlement conference, appellant's counsel stated that appellant wished to be elevated to presumed father status of Jessica. In response, the juvenile court noted there was "an existing order from Family Support regarding the minor, Jessica." Counsel explained that appellant would attempt to elevate himself to presumed father status as to Jessica because he had "acted as a father figure for her," but acknowledged there could be a "competing presumed father situation." The juvenile court allowed appellant to file a "statement of contested issues" no later than March 11, 2011. The juvenile court agreed to the department's request that appellant file a JV-505 form with his statement of contested issues.

At the March 18, 2011, contested disposition hearing, the juvenile court removed the children from the mother and appellant's custody. The court found appellant's progress was "moderate" and authorized reunification services. The juvenile court entered a judgment declaring Mr. A. as Jessica's "biological-alleged" father and eliminating appellant as a possible father of Jessica. The juvenile court then found Mr. A.'s progress was "none" and mother's had been "none to minimal." It denied reunification services for them and scheduled a section 366.26 hearing as to Jessica for July 13, 2011.

On April 22, 2011, appellant filed a JV-505 form, asking to be declared Jessica's presumed father because she had lived with him, he held her out as his own, and he

provided for her. On June 1, appellant filed a Judicial Council form JV-180/section 388 petition asking that the March 18, 2011, order eliminating him as a possible father of Jessica be changed and that he be declared her presumed father. Attached to the JV-180 form was a copy of appellant's earlier JV-505 form and various other supporting documents. Appellant requested a contested hearing to show that he qualified as a presumed father under Family Code section 7611, subdivision (d). On June 14, 2011, the juvenile court denied appellant's request for a hearing, finding that his request for presumed father status alleged no change in circumstances and the relief sought was not in Jessica's best interests. Appellant filed a notice of appeal.

DISCUSSION

1. Issue of Parentage

Appellant makes several interrelated claims that the juvenile court committed prejudicial error: (1) by failing to address his JV-505 form request to be declared Jessica's presumed father; (2) by addressing the JV-180 or section 388 petition instead, because it imposed the additional burden of showing that a change in the court's order would be in Jessica's best interests; and (3) in denying his section 388 petition without a hearing. We find no prejudicial error.

Procedural Background

As chronicled above, appellant filed a JV-505 form on April 22, 2011. In the petition, appellant stated that Jessica had lived with him from birth, in January of 2008, through January of 2010, and then again from May 2010 through September of 2010. He described participating in Jessica's birth, birthday and holiday celebrations, meal preparation, bathing and dressing Jessica, and taking her to parks and playgrounds. He had contributed food and clothing to her care, paid rent and utilities for the home in which they lived, and she was given his surname. Father attached declarations and letters from individuals who considered appellant to be Jessica's father. According to Jessica's mother, Jessica's biological father, Mr. A., never took an interest in her.

At the May 11, 2011, postdisposition review hearing, the juvenile court acknowledged that it had received the JV-505 form. County counsel indicated that father had also filed a JV-180 form and that the hearing was scheduled for the following week.

On May 17, 2011, appellant's counsel stated he was there to represent appellant, who was "the alleged father of the minor, Jessica." The court replied that appellant was not the alleged father of Jessica, "[a]t least the minute order doesn't reflect that," but acknowledged that it had before it appellant's JV-180 form. Because the juvenile court had not read the opposing documents filed by the department, it continued "the 388" until the next hearing date. Appellant's counsel then stated that he wished to be heard before the conclusion of the hearing, but the juvenile court stated that, since appellant was not an alleged father in regards to Jessica, he had "no standing other than the 388 that was filed." Counsel then explained that the juvenile court had made a discretionary order allowing appellant visits with Jessica but that the department had not arranged the requested visits. When counsel mentioned Jessica's biological father, the juvenile court interrupted argument to provide Mr. A., who was present, with counsel. The juvenile court then postponed argument to consider the matter.

At the June 1, 2011, hearing, the department requested that the juvenile court deny appellant's JV-180 form because no new facts were alleged and it was not in Jessica's bests interests. The department argued that, if appellant had wanted to elevate himself to presumed father status, he should have filed a JV-505 form, and that the JV-180 form was not the appropriate vehicle for doing do. The department also argued that appellant was not the biological parent and so "he's not even an alleged father." According to the department, in the initial investigation done in January of 2011, appellant talked about his two daughters, C. and Co., but there is no information that he held Jessica out as his child.

The department's written response to appellant's JV-180 form noted that, during a January 12, 2011, conversation between appellant and the social worker, appellant had

said that he did not care what happened to Jessica and her sister Maria, and that his only concern was for his daughters C. and Co. Appellant later acknowledged having made that statement, but said he did so out of anger at the time. The social worker reported that, after the January 12, 2011, conversation, appellant did not pursue or request visitation with Jessica.

At the hearing, substitute counsel for appellant noted that, contrary to the department's argument, appellant had filed a JV-505 form on April 22, 2011, and when he did so, he was told he needed to file a JV-180 form as well. After counsel and the juvenile court realized that there was a defect as to dates in the JV-180 form, the juvenile court again delayed the hearing to allow counsel to resubmit a corrected JV-180 form.

At the continuation of the hearing on June 14, 2011, the department again requested that the juvenile court deny appellant's JV-180 form, stating that any information that appellant held out Jessica as his own "seems to come after the fact and after dispo for that matter." The department also argued that there was information that Maria and Jessica had problems during visitation with C. and Co. because the older two were not appellant's biological children and were treated differently from the younger two. According to the department, Jessica had been doing better since she no longer had visitation with the two younger siblings.

Counsel for Jessica also requested that the JV-180 form be denied. Counsel argued that Jessica was currently placed with her biological paternal grandparents, who were "looking to adopt," and that she was "doing very well." Counsel also stated that Maria and Jessica had to be removed from placement with C. and Co. because of the way Maria and Jessica were treated in the home while living with mother and appellant.

Appellant's counsel argued that appellant's goal had always been to reunify not only with C. and Co., but with Jessica as well, but he was impeded by the fact that he was not Jessica's biological father and that there was a judgment of parentage finding Mr. A. to be Jessica's father. Counsel alleged that, "[i]t was for that reason that we submitted on

the Department's recommendation at disposition," and that he "bypassed reunification with Jessica for that reason." Counsel argued that appellant's strategy was to hopefully be "a mentor placement" or Jessica's "legal guardian" if he did well in his reunification services with C. and Co. Counsel requested an evidentiary hearing, because "there's case law that would support even when you have judgment of parentage for another father, you still can have two competing presumed fathers."

The juvenile court denied appellant's request for a hearing and denied the JV-180 form, stating that there had been no change in circumstances and that it was not in Jessica's best interests to grant the request.

Presumed Parent Status

Appellant believes there is enough evidence in the record to show he qualifies for "presumed father" status under Family Code section 7611, subdivision (d),[2] but that the juvenile court prejudicially denied him the opportunity to make his case by failing to address his JV-505 form. Respondent argues that the juvenile court properly declined to consider and rule on appellant's JV-505 form because such a request, as in this case made after the setting of a section 366.26 hearing, is more properly done by filing a section 388 petition for modification. (*In re Eric E.* (2006) 137 Cal.App.4th 252, 258, citing *In re Zacharia D.* (1993) 6 Cal.4th 435, 442.) We find that, even if the juvenile court had considered the JV-505 form, the record does not support appellant's contention.

"'The extent to which a father may participate in dependency proceedings and his rights in those proceedings are dependent on his paternal status.' [Citation.]" (*In re Christopher M.* (2003) 113 Cal.App.4th 155, 159.) A man who could be the father of a dependent child but who has not been shown to be a biological or presumed father is an "alleged father." (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 801.) An "alleged father"

[2]Family Code section 7611, subdivision (d) provides that a man is presumed to be the natural father of a child if he: "receives the child into his home and openly holds out the child as his natural child."

has no right to custody, reunification services, or visitation. (*In re O.S.* (2002) 102 Cal.App.4th 1402, 1410.) An "alleged father" only has the right to notice and an opportunity to show he should be afforded presumed father status. (*Id.* at p. 1408.) A presumed father is a man, not necessarily the child's biological father, who has demonstrated a sufficient commitment to his parental responsibilities to be afforded rights which are not afforded to biological fathers merely on the strength of their biological ties to the child. (*In re Jerry P.*, *supra*, at pp. 801-804; see also *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 849.)

There is no evidence in the record that appellant was Jessica's presumed father, other than the fact that Jessica was living with mother and appellant at the time she was detained. Instead, the record established that, when the minors were first detained and at disposition, appellant was willing to do whatever he needed to in order to get C. and Co. back, but he made no mention of his interest in Jessica and he did not hold himself out as Jessica's father. In addition, at the section 388 hearing, appellant's counsel acknowledged that father did not hold himself out as Jessica's presumed father at disposition because he was hoping to be a "mentor placement" or "legal guardian" for Jessica. Thus, at most, the JV-505 form would have provided a vehicle for appellant to establish his biological paternity. But, as discussed above, there does not appear to be any doubt that Mr. A. is Jessica's biological father and the court found so.

Based on the foregoing, we cannot conclude the juvenile court violated appellant's right to due process by denying him the opportunity to prove he qualified for presumed father status. Instead, the record shows appellant specifically elected to proceed only as an alleged father and not to present foundational facts at detention or disposition which could have resulted in a finding of presumed father status. Appellant had the opportunity to request a finding of presumed father status and to present relevant evidence on the issue, but elected not to do so until after a section 366.26 hearing was scheduled. For this

reason, appellant has failed to demonstrate that a hearing on his JV-505 form would have had any effect on his status in these proceedings.[3]

Section 388 Petition

The statutory authority for appellant's JV-180 form is section 388. "Under section 388, a parent may petition the court to change, modify, or set aside a previous court order. The petitioning party has the burden of showing, by a preponderance of the evidence, that there is a change of circumstances or new evidence, and the proposed modification is in the minor's best interests. [Citations.]"[4] (*In re S.M.* (2004) 118 Cal.App.4th 1108, 1119.) The petition for modification under section 388 must contain a "concise statement of any change of circumstance or new evidence that requires changing the [prior] order." (Cal. Rules of Court, rule 5.570(a)(7).) The parent seeking modification must "make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]" (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) Thus, "[t]here are two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the children. [Citation.]" (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

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[3]In his reply brief, appellant contends that his status as presumed father would have been established had the trial court properly complied with section 316.2, subdivision (a), which requires, in relevant part, that "[a]t the detention hearing, or as soon thereafter as practicable, the court shall inquire of the mother and any other appropriate person as to the identity and address of all presumed or alleged fathers." But we need not consider issues raised for the first time in the reply brief, and will not do so here. (See *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482, fn. 10 [unfair to consider issues raised in reply brief].)

[4]Section 388, subdivision (a) reads, in relevant part: "Any parent or other person having an interest in a child … may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court … for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. The petition shall be verified and … shall set forth in concise language any change of circumstance or new evidence that is alleged to require the change of order or termination of jurisdiction."

When determining whether the petition makes the necessary showing, the juvenile court must liberally construe it in favor of its sufficiency. (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 672.) Section 388 specifies that the court must order a hearing be held, "[i]f it appears that the best interests of the child may be promoted by the proposed change of order …." (§ 388, subd. (d).) "'The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition.' [Citations.]" (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505.)

We apply the abuse of discretion standard in our review of the juvenile court's decision to deny the section 388 petition without a hearing. (*In re Brittany K.*, *supra*, 127 Cal.App.4th at p. 1505.) We affirm the order unless it """exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court."""" (*Ibid.*) The juvenile court's decision will not be disturbed """unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination."""" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

Here, after allowing brief argument by counsel for the department, for Jessica, and for appellant, the juvenile court denied the section 388 petition, stating there had been no change in circumstances and that it was not in Jessica's best interests to grant the request for a contested hearing.

We find no abuse of discretion on the part of the juvenile court. Appellant's section 388 petition sought to modify the order issued at the March 18, 2011, dispositional hearing excluding him as a possible father for Jessica. But nothing alleged in appellant's section 388 petition suggested that his circumstances had changed in regards to his claim of paternity of Jessica since the issuance of the March 18th order. Nor did he allege the existence of any new evidence.

We also conclude that the evidence fails to establish that Jessica's best interests would be served by the requested relief. The following factors should be considered in determining whether a section 388 petition addresses the best interests of the child: "(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532.) The strength of the relative bonds between the child and parent and caretakers becomes an even more important factor when a section 388 petition is filed after reunification services have been terminated. In *In re Stephanie M., supra*, 7 Cal.4th at page 317, the California Supreme Court stated, "[a]fter the termination of reunification services, the parents' interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point 'the focus shifts to the needs of the child for permanency and stability' [citation], and in fact, there is a rebuttable presumption that continued foster care is in the best interest of the child. [Citation.]"

Here, appellant alleged in the section 388 petition that the proposed change would allow Jessica to "reunify with me allowing her to continue living alongside her siblings and maintain the family unit." Aside from the fact that any reunification between appellant and Jessica was highly speculative, the allegation completely ignored Jessica's interest in stability. The evidence before the juvenile court was that Jessica, who was in foster care, had had unsupervised visits with her biological paternal grandparents since February of 2011, that the bond between them was "steadily growing stronger" and that Jessica referred to them as her "parents." The grandparents had requested placement of Jessica and were willing to provide a permanent plan of adoption for her.

> "… At this point in the proceedings, on the eve of the selection and implementation hearing, the children's interest in stability was the court's

> foremost concern, outweighing any interest [father] may have in reunification." (*In re Anthony W.*, *supra*, 87 Cal.App.4th at pp. 251-252.)

As appellant did not carry his burden under section 388 to show prima facie either new evidence or a change of circumstance or that the change would be in the best interests of Jessica, the juvenile court did not abuse its discretion in summarily denying the petition for modification.

2. Visitation

Appellant contends that the juvenile court erred in delegating the determination of his visitation with Jessica to the department at the February 23, 2011, disposition hearing. He claims that by doing so, the department was able to use appellant's lack of visitation with Jessica to bolster its argument that appellant was not Jessica's presumed father. Respondent questions whether appellant was ever actually granted visitation with Jessica; that, if he was, he has forfeited the issue by failing to challenge the order earlier; and, in any event, as an alleged father, he lacks standing to do so. We reject appellant's claim because we agree with respondent that no such visitation order ever existed.

Procedural Background

Appellant is correct that the minute order for February 23, 2011, appears to grant the department discretion to allow him unsupervised visits with Jessica. The record shows that the minute order for that date states "Dept. has disc. for unsup. visits btwn FA3 & D4-6 cond. upon 10 crt day written ntc. & updated discovery to all counsel." "FA3" is appellant's minute order designation and "D4-6" are Jessica, C. and Co.'s minute order designations, respectively. But the transcript of the hearing and both previous and later minute orders in the record indicate that the juvenile court only intended that the February 23, 2011, order include appellant's daughters C. and Co.

The record of the February 23, 2011, disposition hearing shows that, after a request from the department, the juvenile court ordered that Jessica's paternal grandparents be given unsupervised visits with her. Appellant's counsel then asked for

"unsupervised visits as well." According to counsel, appellant had been having supervised visitation every Wednesday for two hours, and he particularly wished to have visitation with C. on the upcoming Sunday. Counsel noted that the "dispo report" stated that the department was requesting discretion for unsupervised visits with appellant "pending an assessment of an appropriate home when found." The juvenile court then stated it would "grant the Department discretion to begin unsupervised visits between [appellant] and his children conditioned upon ten-court-day written notice with updated discovery." During this entire discussion between appellant's counsel and the juvenile court, Jessica's name was never mentioned.

As a general rule, a record that is in conflict will be harmonized if possible. If it cannot be harmonized, whether one portion of the record should prevail as against a contrary statement in another portion of the record will depend upon the circumstances of each particular case. (*People v. Harrison* (2005) 35 Cal.4th 208, 226.) More specifically, when a clerk's transcript conflicts with a reporter's transcript, the question of which of the two controls is determined by consideration of the circumstances of each case. (*People v. Malabag* (1997) 51 Cal.App.4th 1419, 1422-1423; see also *People v. Smith* (1983) 33 Cal.3d 596, 599.)

Here, while the reporter's transcript of February 23, 2011, is not entirely clear, it can be made clear within the context of what had already occurred. The detention order of October 6, 2010, states that FA3 (appellant) was to have "reasonable supervised visits with minor's 5, 6" (C. and Co.). The minute order also states that FA3 is to have "no contact" with "D3," referring to the mother's daughter Maria. No mention is made of any visits between appellant and Jessica.

The January 12, 2011, mediation report states that appellant had had supervised visits with C. and Co. once a week. Again, no mention is made of any visitation between appellant and Jessica.

Further clarification of the February 23, 2011, hearing occurred following that hearing. At the March 8, 2011, disposition hearing, appellant's counsel asked to be heard on behalf of appellant and then stated:

> "First of all, I understand that at the last hearing when this was set for contest, the court went ahead and granted the discretionary order for unsupervised visits that's requested in the department's requested findings and orders[.] [¶] … [¶] … And there is a new issue. Well, it's not new for [appellant], but it's new for the court and the parties."

At this point, counsel informed the juvenile court that appellant wished to elevate himself to presumed father status for Jessica. This request then led to the issue discussed in part 1., *ante*. At the end of the hearing, appellant requested unsupervised visits between C. and Co. and appellant's mother, which the juvenile court ordered the department to assess. Again, no mention was made of any visitation between appellant and Jessica.

And in the department's response to appellant's JV-180 form filed on May 4, 2011, there is a notation that a social worker spoke to another social worker on May 13, 2011, "to obtain information in regards to the relationship between Jessica and [appellant]. She stated that [appellant] had inquired about visitation with Jessica and that she informed him that there was no court order for visitation and informed him that he could request visitation in court." The notation then states that appellant made such a request on March 8, 2011, but that "there was no order made to address visitation with Jessica."

In addition to the record, we note that, from the beginning of the dependency proceedings until March 18, 2011, appellant was always referred to as Jessica's alleged father. On March 18, 2011, the juvenile court entered a judgment declaring Mr. A. as Jessica's "biological-alleged" father and eliminating appellant as a possible father of Jessica. Alleged fathers are not entitled to custody, reunification services, or visitation. (*In re O.S., supra*, 102 Cal.App.4th at p. 1410.) For these reasons, we find that the February 23, 2011, order did not authorize visitation of any kind between appellant and

Jessica, and his argument that the juvenile court erred in granting the department discretion in allowing the visits is rejected.

DISPOSITION

The judgment is affirmed.

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DAWSON, Acting P.J.

WE CONCUR:

_____
KANE, J.

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FRANSON, J.